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In the Supreme Court of the United States

No. .....

October Term, 1972

JACOB JACK AVENI, JR.,
Bankrupt,
Petitioner,

vs.

MORTON RICHMAN,
Trustee in Bankruptcy,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jacob Jack Aveni, Jr., hereby petitions for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit, affirming the judgment and determination of the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit, in a written opinion, appearing in 458 F.2d 972 (April 26, 1972) (Appendix A), unanimously affirmed the judgment of the United States District Court (Appendix C), which had previously affirmed the judgment of the Referee in Bankruptcy (Appendix D), whose opinion is not officially published.

JURISDICTION

The judgment and order sought to be reviewed was made and entered on April 26, 1972 (Appendix B). The statutory provision believed to confer on this Court jurisdiction to entertain and review the judgment and order in question is 28 U.S.C. §1254 (1).

QUESTION PRESENTED FOR REVIEW

1. Whether the non-exempt portion of the petitioner's wages, which accrued prior to the date of the filing of the petition in bankruptcy but which were unpaid as of the date of the filing of the petition in bankruptcy passes to the trustee in bankruptcy as property under Section 70 (a) (5) of the Bankruptcy Act, 11 U.S.C. §110 (a) (5), where such wages were the bankrupt's sole source of income both prior to and subsequent to the filing of bankruptcy.

STATUTORY PROVISION INVOLVED

30 Stat. 565, as amended, 11 U.S.C. §110 (a) (5)

"The trustee of the estate of a bankrupt and his successor and successors, if any, upon his or their appointment, qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiated in proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction and criminal conversation, shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further,* That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . . ."

STATEMENT OF THE CASE

The bankrupt, petitioner herein, filed a voluntary petition in bankruptcy on November 2, 1970. On January 25, 1971, the respondent, trustee in bankruptcy, filed an application for an order on the bankrupt to pay to him the sum of $71.50, which sum represented the unpaid portion on the bankrupt's earnings for 30 days immediately preceding the filing of the bankruptcy petition, and which earnings were not exempt under the laws of the State of Ohio. The application filed by the trustee in bankruptcy alleged that this non-exempt portion of wages constituted property and thus constituted an asset of the bankruptcy estate and therefore passed to the trustee in bankruptcy.

Objections to the application of the trustee were filed on behalf of the bankrupt. The matter was then submitted to the referee in bankruptcy upon an agreed statement of facts. The referee in bankruptcy concluded that the bankrupt had failed to show that these non-exempt wages were not "property" as that term is used within the context of Section 70 (a) (5) of the Bankruptcy Act, 11 U.S.C. §110 (a) (5).

The evidence showed that the bankrupt's sole source of income, both prior to and subsequent to the date of his filing of his petition in bankruptcy, was his wages from his employer. The evidence disclosed that on November 13, 1970, approximately 11 days after the filing of his bankruptcy petition, the amount of $71.50 was paid by the employer to the petitioner.

The referee in bankruptcy, held that no evidence was presented by the bankrupt that the accrued unpaid and non-exempt wages were necessary or needed by the petitioner for a fresh start after the bankruptcy proceedings.

The referee in bankruptcy found that two tests were to be employed in order to determine whether the non-exempt

wages were really considered "property" which passed to the trustee in bankruptcy as of the date of the filing of the bankruptcy petition. The first of these tests was whether the wages were non-exempt under the applicable state law and the second test being whether these funds were needed by the bankrupt to afford him a "fresh start" after the filing of his bankruptcy petition.

Upon further review by the United States District Court for the Northern District of Ohio, Eastern Division, the court found that there was no error in the referee's determination which was reflected in his order and therefore denied the bankrupt's petition for review. Thereafter, a petition for an allowance of an appeal under the bankruptcy act was then filed with the United States Court of Appeals for the Sixth Circuit, which petition was allowed by that court.

Upon review by the United States Court of Appeals for the Sixth Circuit, the judgment of the District Court was affirmed, that court holding that regular wages earned prior to bankruptcy are sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that these wages should be regarded as property under the bankruptcy act title to which passes to the trustee upon the filing of a petition in bankruptcy.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered and filed on April 26, 1972 and thereafter, the petitioner sought review in the United States Supreme Court by Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

POINT I

Wages due a bankrupt which are earned prior to the filing of the petition in bankruptcy but which have not been paid as of the date of the filing of bankruptcy and which are not exempt under the applicable state law do not constitute "property" within the meaning and context of Section 70 (a) (5) of the Bankruptcy Act, 11 U.S.C., §110 (a) (5).

The sole issue presented in this appeal is a question not heretofore squarely decided by this Court. It concerns whether, under the provisions of the Bankruptcy Act, wages of a bankrupt, whose sole source of income both prior to and subsequent to the filing of the bankruptcy petition consisted of the wages earned from his employer, which wages were due and payable as of the date of the filing of the bankruptcy petition but which had not been paid to him and which were otherwise not exempt under the Ohio statutes constitutes property that the trustee in bankruptcy is entitled to. Ohio Revised Code §2329.66.

The referee in bankruptcy in overruling the objection of the bankrupt to the turnover order stated that there are two tests under the Bankruptcy Act which had to be made in order to determine whether these non-exempt but accrued wages were to be considered property, the title to which vested in the trustee on the date of the filing of the bankruptcy petition.

The referee in bankruptcy stated that a determination as to whether these were exempt from execution under the applicable state law was the first test and the second test being whether these unpaid wages were needed by the bankrupt to afford him a "fresh start" after the filing of his bankruptcy petition.

The referee in bankruptcy proceeded to determine this matter upon equitable principles sitting as a court of equity. The referee held that in instances where "extreme hardship" had been shown by the bankrupt the court in the past had denied applications for turnover orders on non-exempt wages despite the clear right of the trustee to this property under the applicable state law.

The Court of Appeals for the Sixth Circuit acknowledged that assets of a bankrupt must be regarded as property unless the transfer to the trustee in bankruptcy would interfere with the ability of the bankrupt to make an "unencumbered fresh start."

The Court of Appeals then proceeded to distinguish *Lines* v. *Frederick*, 400 U.S. 18 (1970), *affirming* 425 F.2d 215 (9th Cir. 1970). In *Lines* this Court specifically held that accrued but unpaid vacation pay due a bankrupt did not constitute property and therefore the trustee in bankruptcy had no right to that asset. The Court of Appeals in this case proceeded to distinguish the *Lines* holding that regular wages not paid as of the date of the filing of the petition in bankruptcy were different from future wages. In its analysis, the Court of Appeals completely overlooked the purpose of the Bankruptcy Act which is to give the bankrupt an unencumbered fresh start.

It would seem even upon cursory examination that actual earned wages which are earned prior to the filing of the bankruptcy petition and which are to be paid in the normal course of business are more needed by the bankrupt than accrued vacation pay which is to be used at some indeterminable future date or in the event of a layoff which may or may not come. The wages earned by a bankrupt are needed for his daily subsistence. These wages are what is needed by the bankrupt in order for him to maintain himself immediately after the filing of his bank-

ruptcy petition "unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Company v. Hunt*, 292 U.S. 234, 245 (1934).

To distinguish accrued but unpaid wages as not constituting property while holding that accrued vacation pay which is payable at some future indeterminable date as constituting property is to gainsay rationality in the workable definition of "property" under the spirit and purpose of the Bankruptcy Act.

The Court will also note that in many states, not including Ohio, personal wage garnishments have been legislatively eliminated. While the operation of the Bankruptcy Act does in many instances rely upon legal determinations made by the applicable state law, still the purpose of affording the bankrupt an unencumbered fresh start is an all pervading policy of the act not subject to the various differences one might encounter from state to state. Thus, in one state, where these wages might not be considered property they are in other states. This certainly does not support a uniform federal policy upon this subject which certainly the Congress intended to apply.

Therefore, it is requested that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be allowed in this matter to consider this important question of federal bankruptcy law and to determine this question not heretofore decided by this court on a uniform basis to be applied to all of the states and to all persons seeking relief under the Federal Bankruptcy Statutes.

CONCLUSION

The question presented in this appeal is certainly one of importance and one not heretofore decided squarely in any reported case by this Court. This Court should allow the petition for writ of certiorari and hear this matter upon a plenary consideration of the entire record and, upon consideration thereof, reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

PAUL MANCINO, JR.
One Public Square Building
Suite 1001
Cleveland, Ohio 44113
Counsel for Petitioner

FRANK MANCINO
MANCINO, MANCINO & MANCINO
Of Counsel

APPENDIX A

Opinion of United States Court of Appeals

(Decided and Filed April 26, 1972.)

(458 F.2d 972)

No. 71-1774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB JACK AVENI, JR., BANKRUPT,
Appellant,

v.

MORTON RICHMAN, TRUSTEE IN BANKRUPTCY,
Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio.

Before: CELEBREZZE and PECK, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

PER CURIAM. The question presented on appeal is whether the non-exempt portion of a bankrupt's wages, which was accrued but unpaid on the date of the filing of his petition, passes to the trustee in bankruptcy as "property" under §70a (5) of the Bankruptcy Act, 30 Stat. 565, as amended, 11 U.S.C. §110(a) (5), where such wages were the bankrupt's sole source of income. The referee in bankruptcy granted an application by the trustee for a "turnover order" of the amount in question, $71.50, holding that this amount is "property" which passes to the

trustee under the Act. Upon denial of the bankrupt's petition for review by the District Court, this appeal was perfected.

The bankrupt, Aveni, filed his petition in bankruptcy on November 2, 1970. During the 30-day period prior thereto, he earned a total of $925.90 in gross wages from his employer, and under the laws of the State of Ohio, all but $71.50 of the wages were exempt from attachment. *See* Ohio Rev. Code §2329.66 (1970). Thus, the Ohio statutory scheme relating to bankruptcy proceedings provides for the support of the bankrupt and his family out of the wages which are the subject of this dispute. Aveni maintains, nevertheless, that he should also be entitled to retain the non-exempt portion of his wages, urging that as a matter of law the non-exempt wages cannot be included within the definition of the term "property" which passes to the trustee under §70a(5). We cannot agree.

It is well established that assets must be regarded as "property" under the Act unless their transfer to the trustee will interfere with the ability of the bankrupt to make an "unencumbered fresh start" after the date his petition is filed. *Segal v. Rochelle*, 382 U.S. 375, 380 (1966); *Frederick v. Lines*, 425 F.2d 215 (9th Cir. 1970), *aff'd*, *Lines v. Frederick*, 400 U.S. 18, 20 (1970). This is because the basic purpose of the statute is to place the bankrupt on the same footing as others similarly situated from the date of the bankruptcy by affording him the same opportunity to accumulate new wealth in the future "unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *see Lines v. Frederick, supra*, 400 U.S. at 19. Accordingly, where particular assets of the bankrupt constitute future wages (earned income the bankrupt cannot collect until some date subsequent to the bankruptcy) or are analogous to future wages, as in the case of accrued vacation pay or

Social Security benefits, they do not pass to the trustee as "property." *Segal v. Rochelle, supra,* 382 U.S. at 379-80; *Frederick v. Lines, supra,* 425 F.2d at 217.

Earned wages, however, are far different from future wages. Earned wages are normally payable at a fixed time following the rendering of services by an employee, and the occurrence of bankruptcy does not alter the maturity of the employer's obligation to pay. Thus, such wages frequently become available during the bankruptcy proceedings and the statutorily authorized exemptions provide the bankrupt with a purse from them to meet his basic needs. Bankruptcy accompanied by such an arrangement for exemptions is reasonable to the creditors and is clearly more advantageous to the debtor than to experience, for example, the garnishment of his wages. Certainly, the situation here is in no way comparable to the kind of wage attachment shown in *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340 (1969), where prejudgment garnishments of the Wisconsin type often worked tremendous hardships on workers with families to support.

The Bankruptcy Act is designated to give the bankrupt a fresh start to begin anew, but this concept should not be judicially expanded to include "property" which would otherwise vest in the trustee. Regular wages earned prior to the bankruptcy "are sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start", (*Segal v. Rochelle, supra,* 382 U.S. at 380), that they should be regarded as "property" under §70a(5) which passes to the trustee.

Affirmed.

APPENDIX B

Judgment of United States Court of Appeals

(Entered April 26, 1972)

No. 71-1774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB JACK AVENI, JR., BANKRUPT,
Appellant,

vs.

MORTON RICHMAN, TRUSTEE IN BANKRUPTCY,
Appellee.

Before: CELEBREZZE and PECK, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that appellee recover from appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JAMES A. HIGGINS, *Clerk*

APPENDIX C

Order of the District Court

(June 17, 1971)

Case No. B-70-5829

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

In the Matter of:
JACOB JACK AVENI, JR.,
Bankrupt.

UPON CONSIDERATION of the bankrupt's petition for review, and,

THIS COURT finding no error in the Referee's determination, as reflected by the order of April 1, 1971 and certificate on petition for review,

IT IS HEREBY ORDERED that the petition for review is denied.

/s/ BEN C. GREEN
United States District Judge

APPENDIX D

Order and Opinion of Referee

(March 29, 1971)

Case No. B-70-5829

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

In the Matter of:
JACOB JACK AVENI, JR.,
Bankrupt.

At Cleveland, in said District, upon this 29th day of March, 1971.

Came on for hearing the application of Morton Richman, trustee of the estate of the above-named bankrupt, for an order upon bankrupt to pay the sum of Seventy-one dollars and 50/100 ($71.50) to the trustee, it being alleged that the sum represents non-exempt portion of bankrupt's earnings due and unpaid as of the date of bankruptcy, but paid to the bankrupt thereafter.

Due notice of application of trustee and of hearing thereon having been given by ordinary mail to bankrupt and his counsel, and bankrupt's counsel appearing in opposition thereto, and upon statements and representations of counsel for bankrupt, and counsel for the trustee, and all proceedings had before me,

IT APPEARING THAT:

1. Trustee and counsel for bankrupt have joined in an agreed statement of facts containing assertions of fact being #1 through and including #7, and assertions of claims

of the parties, being #8 as to the position of trustee, and #9 as to the petition of the bankrupt;

2. No evidence or facts other than those contained within said agreed statement of facts were presented to the Court.[1]

THE COURT THEREFORE FINDS AND ADOPTS as findings of fact items #1 through #7 in the "Agreed Statement of Facts" attached hereto.

THE COURT FURTHER FINDS that no evidence has been presented that the sum requested of the bankrupt to be paid to the trustee, pursuant to application filed therefore by trustee, is necessary or needed by the bankrupt for a "fresh start" after bankruptcy.

FACTUAL BACKGROUND

The bankrupt filed his petition in bankruptcy and was adjudicated a bankrupt on November 2, 1970. At the time of bankruptcy, the bankrupt was due wages which were subsequently paid to him. The non-exempt portion of wages involved is Seventy-one dollars and 50/100 ($71.50).

The trustee has applied for an order of the Court requiring that bankrupt turn over the sum of Seventy-one dollars and 50/100 ($71.50) claiming that such property is an asset of the estate, being non-exempt pursuant to state law.

The bankrupt, by his counsel, has objected to the application of trustee asserting only that bankrupt's wages represent his sole source of income.

---

1. There was due opportunity to present evidence on February 11, 1971 and thereafter. Court requested evidence upon three occasions, being: February 25, 1971 when counsel presented statements of facts, March 4, 1971 at hearing set therefore. Neither counsel for trustee or bankrupt desired to do more than present those facts contained within the agreed statement of facts.

THE ISSUE

The basic question at issue is whether non-exempt wages or personal earnings of a bankrupt due but unpaid as of the date of bankruptcy pass to the trustee, or whether they are to be considered fully necessary for the bankrupt's fresh start after bankruptcy and thereby not available to the trustee.

APPLICABLE LAW

The U. S. Supreme Court has recently ruled in the case of *Lines v. Frederick*, 91 U.S. 113 (November, 1970) that a bankrupt's vacation pay which accrued but was unpaid as of the date of bankruptcy was not "property" within the meaning of that term per Sec. 70 a (5) of the Bankruptcy Act.

The Supreme Court in its opinion in *Lines v. Frederick, supra,* citing the rationale of *Local Loan v. Hunt*, 292 U.S. 234, stated:

> "The most important of the considerations limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act."

In the light of that approach, considering the philosophy of the Bankruptcy Act, the test that the Supreme Court applied in determining whether the vacation pay in that instance is property within the meaning of Sec. 70 a (5) Bankruptcy Act, is whether it is:

". . . entangled with the bankrupt's ability to make an unencumbered fresh start."

Lines v. Frederick, supra.

In a number of cases eminating from our own District, the Court determined that it was the obligation of the bankrupt to surrender all of his non-exempt property held as of the date of bankruptcy. Further, that it was the duty of the trustee to seek to obtain non-exempt wages due bankrupt from his employer on the date of bankruptcy. *In re Rice,* 91 O.L. Abs. (1962); *In re Prpich,* 85 O.L. Abs. (1960); *In re Ponder,* 67 O.L. Abs. (1954).

Specifically, non-exempt wages have been held to be property and an asset of the estate to be turned over to whether or not by the law applicable thereto, the funds in question were non-exempt, and thereby subject to be seized, impounded, or sequestered. *In re Prpich, supra.*

Until the recent Supreme Court's ruling in *Lines v. Frederick, supra,* the application of the sole standard of the state law exemptions were singularly appropriate. It would seem that the clear import of the Supreme Court's recent ruling in the *Lines* v. *Frederick* case is that we are now to apply a dual test in regard to earnings which accrued prior to bankruptcy but were paid thereafter.

This dual test being first: Whether the fund is non-exempt under the applicable law; and second, whether it is needed by the bankrupt for him to be afforded a "fresh start" after bankruptcy.

Although the Supreme Court in *Lines v. Frederick, supra,* addressed itself to the issue of vacation pay, not wages earned for services as rendered, as in this case, this Court would treat them similarly in this instance. Vacation pay has been determined to be, in effect, additional

wages. *In re Ad Service Engraving Co.*, 338 F.2d 41 (CCA 6th, 1964).

The Supreme Court in considering *Lines v. Frederick, supra*, and undoubtedly mindful of provisions of Sec. 6 of the Bankruptcy Act, which leaves unto the laws of the petitioners domicile state or to the appropriate federal law, determination of exemptions, did by its opinion in *Lines v. Frederick, supra*, circumscribe the definition of "property" by an equitable approach to its interpretation as it applies to individual bankrupts.

Bankruptcy Courts have long been characterized as courts of equity. *Pepper v. Litton*, 308 U.S. 295 (1934). In deed, per Sec. 2 (a) of the Bankruptcy Act, they are invested:

> ". . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act. . ."

As a court of equity, this Court in the past has entertained bankrupt's representations of "extreme hardship" in instances where the trustee has sought the turnover of nonexempt wages. In instances where such representation was made as a defense to the application of the trustee for a turnover of non-exempt monies and facts presented to the satisfaction of the Court, the application for turnover of non-exempt wages was denied, in spite of the trustee's right otherwise to the non-exempt property per the state law.

It is the belief of this Court that it is the thrust of the Supreme Court decision that we harken, not just to a situation involving "extreme hardship", but one now wherein the earnings are required for the bankrupt to have a fresh start after bankruptcy.

The assertion of an objection to a trustee's application for non-exempt property is in the nature of an affirmative defense which must be presented and supported to the Court with weight sufficient to satisfy the Court as to its validity.

To hold that all personal earnings regardless of amount are, ipso facto, necessary for the fresh start of the bankrupt, or that all bankrupts are on a par each with the other as to the amount needed for a fresh start, would leave wide the door for abuses and unfairness, resulting either in unwarranted benefits or undue harshness in particular instances. It does not seem that the bankrupts should merely keep what they may have had coming regardless of the amount due as wages without at least inquiry by the Trustee, and thereafter determination by the Court as to whether it is needed for the "fresh start" of the bankrupt.

CONCLUSIONS OF LAW

THE COURT CONCLUDES THAT:

1. The trustee is entitled to the non-exempt property of the bankrupt, unless such property is needed for bankrupt's fresh start after bankruptcy.

2. Assertion of such need for a fresh start is an affirmative defense to the application of trustee directed to turnover of non-exempt property.

3. Representations must be made and evidence presented to the satisfaction of the Court that the subject of the application of the trustee is needed by the bankrupt for his fresh start.

4. In this instance, no such evidence of need of the non-exempt property for bankrupt's fresh start was presented.

It is THEREFORE ORDERED, ADJUDGED, AND DECREED that the trustee's application be, and it hereby is, granted and the bankrupt ordered to pay to the trustee the sum of Seventy-one dollars and 50/100 ($71.50).

/s/ JOSEPH PATCHAN
Referee in Bankruptcy

March 17, 1971

APPENDIX E

U.S. Bankruptcy Act, 11 U.S.C. §110

§110. Title to property

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided,* That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the, trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and

sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the

bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

(b) The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing

which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforcible. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable

proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

(d) After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs—

(1) A transfer of any of the property of the bankrupt, other than real estate, made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien upon the property so transferred;

(2) A person indebted to the bankrupt or holding property of the bankrupt may, if acting in good faith, pay such indebtedness or deliver such property, or any part thereof, to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending;

(3) A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith

unless he has reasonable cause to believe that the petition in bankruptcy is not well founded;

(4) The provisions of paragraphs (1) and (2) of this subdivision shall not apply where a receiver or trustee appointed by a United States or State court is in possession of all or the greater portion of the non-exempt property of the bankrupt;

(5) A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided in this subdivision and in subdivision g of section 44 of this title, no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: *Provided, however,* That nothing in this title shall impair the negotiability of currency or negotiable instruments.

(e) (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: *Provided, however,* That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever

may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

(f) The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever a sale of real or personal property of a bankrupt is made by or through an auctioneer employed by the court, receiver, or trustee, the auctioneer must be a duly licensed or authorized auctioneer in the place where the sale is to be conducted. As amended Sept. 25, 1962, Pub.L. 87-681, §§9, 10, 76 Stat. 571; July 5, 1966, Pub.L. 89-495, §5, 80 Stat. 269.

(g) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

(h) Repealed. July 7, 1952, c. 579, §23(g), 66 Stat. 430.

(i) Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrange-

ment or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangement or plan. July 1, 1898, c. 541, §70, 30 Stat. 565; Feb. 5, 1903, c. 487, §16, 32 Stat. 800; May 27, 1926, c. 406, §16, 44 Stat. 667; June 22, 1938, c. 575, §1, 52 Stat. 879; Mar. 18, 1950, c. 70, §2, 64 Stat. 23; July 7, 1952, c. 579, §23, 66 Stat. 429.

APPENDIX F

Ohio Revised Code §2329.66

§2329.66. Property of heads of families and widows exempt from attachment.

Every person who is the chief support of a family, or who is a person paying alimony, maintenance, or other allowance for the support of a divorced or separated spouse, or for the support of a minor child, or is the chief support of any dependent person, and every widow may hold property exempt from execution, attachment, or sale, for debt, damage, fine, or amercement, as follows:

(A) The wearing apparel of such person or family, the beds, bedsteads, and bedding for their use, one cooking stove and pipe, one stove and pipe used for warming the dwelling, and fuel sufficient for a period of sixty days, actually provided and designed for use of such person or family;

(B) Livestock or household furnishings not exceeding six hundred dollars in value to be selected by the debtor;

(C) All books used in the family, and all family pictures;

(D) Provisions actually provided and designed for the use of such person or family, not exceeding one hundred and fifty dollars in value, to be selected by the debtor;

(E) The tools and implements of the debtor necessary for carrying on his profession, trade, or business, including agriculture, to be selected by him, not exceeding six hundred dollars in value;

(F) All articles, specimens, and cabinets of natural history or science, whether animal, vegetable, or mineral, except such as are kept or intended for show or exhibition for money or pecuniary gain;

(G) Except as provided in section 3115.23 of the Revised Code, personal earnings of the debtor for services rendered within thirty days before the issuing of an attachment or other process, the rendition of a judgment, or the making of an order, under which the attempt may be made to subject such earnings to the payment of a debt, damage, fine, or amercement, in an amount equal to the greater of the following amounts:

(1) One hundred seventy-five times the minimum hourly wage in effect at the time the earnings are payable, as prescribed by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 206(a)(1), and any amendments or additions thereto or reenactments thereof.

(2) Eighty-two and one-half per cent of the debtor's disposable earnings payable from a garnishee, or, when the exemption is claimed by the debtor pursuant to a proceeding in bankruptcy, eighty-two and one-half per cent of the debtor's gross earnings for the thirty-day period ending on the tenth day prior to filing the petition in bankruptcy.

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In the Supreme Court of the United States

October Term, 1972

No. 72-101

JACOB JACK AVENI, JR.,
Bankrupt,
Petitioner,

vs.

MORTON RICHMAN,
Trustee in Bankruptcy,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

RONALD M. RUBENSTEIN
SELKER, EINBUND & RUBENSTEIN
3000 Terminal Tower
Cleveland, Ohio 44113
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 831-6441

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BRIEF OF RESPONDENT IN OPPOSITION

JURISDICTION

The argument presented by the Petitioner on Section 70(a)(5), of the Bankruptcy Act is not a novel issue or case to be heard by the Supreme Court, although within the jurisdictional grounds of 28 U.S.C. § 1254(1).

The other arguments raised by Petitioner have never been raised in the lower courts and do not appear to be within the certiorari jurisdiction of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

Whether the non-exempt portion of the Petitioner's wages, which accrued prior to the date of the filing of the petition in bankruptcy but which were unpaid as of the date of the filing of the petition in bankruptcy passes to the trustee in bankruptcy as property under Section 70(a)(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5).

STATUTORY PROVISIONS INVOLVED

U. S. Bankruptcy Act, 11 U.S.C. Sec. 110(a)(5)

"The Trustee of the estate of a bankrupt and his successor and successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating in proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located. . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction and criminal conversation, shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And *provided further,* THAT when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash

surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . . ."

U. S. Bankruptcy Act, 11 U.S.C. Sec. 24

"This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* THAT no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

STATEMENT OF THE CASE

Respondent, for the purposes of this Brief in Opposition to Petitioner's Writ of Certiorari, accepts Petitioner's Statement of the Case.

ARGUMENT

I

The Issues Raised in the Petitioner's Brief Have Not Been Raised in the Lower Courts and Are Not Now Timely Brought.

The Petitioner has based this Court's jurisdiction over this case upon Title 28, Section 1254 of the United States Code. To come within the jurisdictional limits of Section 1254, the Petitioner must present an appropriate question for review. The writ of certiorari explicitly states that this Court is not to sit as a Court of first instance but is to review the disposition of the Court of Appeals.

The Petitioner in his argument, directly or indirectly, has urged upon this court three issues for consideration. They are for convenience herein referred to as: (1) Bankrupt's need for a "fresh start"; (2) Bankrupt's need for "subsistence"; (3) Uniformity of garnishment laws.

The record of this case illustrates that two of the three issues presented by the Petitioner's Petition for Writ of Certiorari have not been raised prior to this time and were not submitted to the lower courts for consideration. These two issues are those of subsistence and garnishment. The issue "fresh start" presented by Section 70 of the Bankruptcy Act was raised in a timely fashion in the courts below, and it is the only appropriate issue for consideration.

This Court has repeatedly spoken directly to the issue of review, *Lawns v. United States,* 355 U.S. 339 (1958) rehearing denied 355 U.S. 967 (1958); *United States v. Classic,* 313 U.S. 299 (1940) rehearing denied 314 U.S. 707 (1941). In *Lawns v. United States, supra,* this Court noted that the Supreme Court would review questions not raised in the lower court only in exceptional cases.

Respondent respectfully submits that the Petitioner has presented to this Court two issues which do not come within the jurisdictional requirements of Title 28 of the United States Code, Section 1254, or even the guidelines set forth in *Lawns v. United States, supra.*

II

In the Event That This Court Finds All the Questions Raised by the Petitioner Are Within the Discretionary Jurisdiction of This Court, Respondent States That the Circuit Court of Appeals Should Be Affirmed.

A. Wages due the Bankrupt and owed as of the date of filing of bankruptcy and which are not exempt under the applicable state laws do constitute property within the meaning of Section 70 of the Bankruptcy Act.

The question of what constitutes property for the purposes of employing Section 70 of the Bankruptcy Act is an issue that has been passed upon by this Court many times in the past. Section 70a(5) sets the test for this type of property. It states

> (5) property . . . which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. . .

The Sixth Circuit Court of Appeals in the case herein has stated:

> The Bankruptcy Act is designated to give the bankrupt a fresh start to begin anew, but this concept should not be judicially expanded to include "property" which would otherwise vest in the trustee. Regular wages earned prior to the bankruptcy "are sufficiently rooted in the pre-bankruptcy past and so little entangled with

the bankrupt's ability to make an unencumbered fresh start" (Segal v. Rochelle, supra, 382 U.S. at 380), that they should be regarded as "property" under Sec. 70a(5) which passes to the trustee.

As is noted in the record before this Court, the Petitioner has totally failed to exclude the circumstances of this case from the clear criteria of Section 70a(5). Petitioner has further failed to demonstrate the necessity or logic of abandoning this test.

The term "property" is not a self-defining term. In this instance, however, the Bankruptcy Act has pronounced a clear formula for arriving at a determination of the question and has provided the means by which each individual case can be determined on the basis of its facts and by so doing, has provided a legal as well as clear standard.

The court held in *Frederick v. Lines*, 425 F.2d 215, 217 (9th Cir. 1970), aff'd 400 U.S. 18 (1970) that:

> From the employee's standpoint, there is no similarity between earned wages that he will receive at the end of the week and bookkeeping entries showing vacation credits that he can convert to cash only when he takes a vacation or is laid off. Those earned credits are as inaccessible to him as entries in his Social Security account before he reaches retirement age.

The same court also said at page 216:

> Under Section 70a(5) of the Bankruptcy Act (11 U.S.C. Section 110a(5), vacation is "property", title to which vests the trustee only if it is (1) non-exempt, (2) transferable or lienable and (3) so little entangled with the bankrupt's ability to make an unencumbered fresh start, that it should be so regarded.

B. The Petitioner has failed to demonstrate in any way the fact that the wages involved in the turn-over order were needed by him for his daily subsistence.

The specific purpose of the Bankruptcy Act is to "aid the unfortunate debtor by giving him a fresh start in life free of debt." *Stellwagen v. Clum,* 245 U.S. 605 (1918). The Bankruptcy Act also serves the rights of the creditors. The debtor's daily subsistence needs and the rights of the creditors can and do conflict. However, Respondent respectfully submits that in the instant case, the Petitioner has failed and refused to demonstrate such a need. As is noted in the record, the turn-over order at issue for $71.50 represents only the non-exempt portion of the $925.90 in wages earned by the Bankrupt during the 30 day period prior to his filing of bankruptcy. Furthermore, Section 70a of the Bankruptcy Act provides that exemptions allowed by Section 6 are for the Bankrupt's daily subsistence.

Since the creation of the Bankruptcy Act in 1898, and its earliest interpretation, it has been well established that the intent of the Bankruptcy Act is to relieve the debtor of his honest debts and permit him a fresh financial start. See *Wetmore v. Markoe,* 196 U.S. 68, 77 (1904); *Williams v. United States Fidelity & Guaranty Co.,* 236 U.S. 549 (1915); *Stellwagen v. Clum,* 245 U.S. 605 (1918) and *Local Loan Co. v. Hunt,* 292 U.S. 234 (1934). A "fresh start" without the burden of past debts is what the Bankrupt seeks when he files his petition in bankruptcy.

In order for the Bankrupt to achieve the fresh financial start, he is obligated to comply with the provisions of the Bankruptcy Act. Section 70 of the Bankruptcy Act states that:

> The trustee of the estate of a Bankrupt . . . *shall* . . . *be vested by operation of law* with the title of the

> Bankrupt as of the date of the filing of the petition . . . except insofar as it is to property which is held to be exempt. . . (Emphasis supplied.)

The Trustee claims certain rights of the Bankrupt. Among those rights is the right to collect money earned prior to bankruptcy, and owed to the Bankrupt on the date of adjudication.

The Petitioner now contends that he needs these non-exempt funds for his daily needs. Even though this argument has not been raised in the lower courts, Section 6 of the Bankruptcy Act allows the Bankrupt whatever exemptions that his resident state permits. Such exemptions are for the daily needs and subsistence of the Bankrupt. The Sixth Circuit Court of Appeals in the instant case herein held that:

> . . . such wages frequently become available during the bankruptcy proceedings and the statutorily authorized exemptions provide the bankrupt with a purse from them to meet his basic needs.

C. A wage turn-over order differs markedly from a wage garnishment, and absent a demonstration of financial hardship in no way encumbers a bankrupt from making a fresh financial start.

There is a lack of relevancy between Petitioner's reference to wage garnishments and the rights granted under Section 70 of the Bankruptcy Act. There are a great many differences between garnishments and wage turn-over orders.

Among the major differences are the parties affected. In a garnishment the court orders the employer of the debtor to withhold a certain sum and pay it immediately

into court. A wage turn-over order is an order against the Bankrupt to pay certain sums into the estate for all creditors. Garnishments are three party actions and turn-over orders are two party actions. A wage turn-over order in no way affects the Bankrupt's relationship with his employer since the money requested is already in the Bankrupt's possession. Further, the compliance with a wage turn-over is not as harsh as a wage garnishment may be. In the instance of a wage turn-over order, the Bankrupt is given a reasonable time to comply with the order.

In the case at bar the $71.50 is non-exempt money that is property and vests in the trustee. The trustee was performing his duty in collecting that property under Section 47 of the Bankruptcy Act which states that the trustee "shall collect and reduce to money the property of the estates for which they are trustees. . ." In *Brown v. Crawford*, 252 Fed. 248 (D.C., Ore. 1918) at page 252 the court said:

> This covers any interest in the property the Bankrupt may have had, however minute, that was subject to transfer by him or levy or sale by judicial process. This statute is designed to be so broad and searching as to comprise all property that the Bankrupt may have that may be of use or benefit to him no matter how small.

CONCLUSION

The Petition for Writ of Certiorari is a prerogative Writ within the discretion of the Supreme Court of the United States. It is granted when there is a substantial question of law and when the issues were raised in the lower courts of the first instance. There is no substantial question of law and all the issues raised in Petitioner's Brief are not properly raised in this case at this time. The Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

RONALD M. RUBENSTEIN
SELKER, EINBUND & RUBENSTEIN
3000 Terminal Tower
Cleveland, Ohio 44113
Attorney for Respondent